Neil Macvicar pursued James Cochran, and James Ker of Crummock, his real creditor upon the lands, in a declarator of tinsel of the feu, *ob non solutum canonem;* who defended themselves on the quality of their right: And the LORD ORDINARY, 21st July 1748, 'repelled the defence.' No 9.

Pleaded in a reclaiming bill; The irritancy sought to be declared, is no natural consequence of superiority; it is no part of the feudal law, and was only introduced into ours by statute 1597, 'in the same manner as if a clause irritant 'were ingrost in infeftments of feu-farm:' It cannot be doubted that it might be stipulated, a failure for ten years should be necessary in order to irritate the right; and the irritancy may as well be effectually discharged. Clauses of this nature in a feu-charter were found effectual, 9th November 1748, Nasmith of Ravenscraig against Storie of Braco, *voce* HOMOLOGATION; in which indeed, it was pleaded, that the successor in the superiority was expressly burdened with the feu-right; but the general point was also argued; and the present case is similar in the specialty, the feu-contract with Cochran being assigned.

Answered; A feu cannot be so constituted as to be contrary to law, and subsist to the prejudice of a successor in the superiority. By the nature of feu-holdings, an irritancy is incurred by failing to pay the duty; and, it is no matter that this irritancy is peculiar to this country, and introduced by statute, as the feudal law is local. A feu cannot subsist without a duty; and it might as well be pleaded, that a duty might be constituted, but that it might be stipulated, there should ly no action of poinding the ground for recovery thereof. This case is not similar to that of Ravenscraig and Braco, where the superior's right was burdened with the feu-contract; but here, the contracts are assigned to the purchaser, in so far as conceived in the superior's favour.

THE LORDS found the clause in the defender's charter and sasine, exeeming him from the legal irritancy, *ob non solutum canonem*, was real, and therefore sustained the defence.

Act. *Lockhart.* Alt. *Miller.* Clerk, *Murray.*

Fol. Dic. v. 3. p. 206. D. Falconer, v. 2. No 53. p. 51.

1751. *July* 25. SALMON of Whin *against* The LORD BOYD.

No 10.
A clause in a feu-charter, 'that the feu-'duty should 'be doubled 'the first year 'of the entry 'of each heir, 'as use is, of 'feu-farm,'

THE estate of Linlithgow and Callendar being forfeited by that Earl's accession to the rebellion 1715, was disponed to the York-buildings Company, and by them set in tack to the Earl and Countess of Kilmarnock, and longest liver of them; as more particularly mentioned in the decision, 22d November 1749, Lord Boyd against the King's Advocate, *voce* FIAR.

The Countess surviving her husband, came to have right to the tack; in which she was succeeded by James Lord Boyd her son, whom Patrick Salmon of

No 10. was found not to oblige the superior to receive a singular successor, unless on payment of an year's rent.

Whin, purchaser of an old feu of the estate, charged to receive him as his vassal on payment of a year's feu-duty of composition; the grant being conceived in these terms, doubling the said feu-duty the first year of the entry of each heir or assignee, as use is of feu-farm.

Suspended, For that, if it had been the intention to have granted the vassal a right of an anomalous nature from other feus, it would have been requisite to have expressed it in distinct terms; and, at least, it is not here clear there was any such intention: The word *assignee* does not apply to real, but personal rights; and therefore, though a charter be granted to assignees, it is only before infeftment that it can be assigned, Stair, B. 2. tit. 3. § 5. t. 4. § 32.; Mackenzie, B. 3. t. 5. § 1., and hence it is that a charter to assignees is no defence against recognition, Stair, B. 2. t. 11. § 22. B. 3. t. 1. § 16. t. 2. § 13.; Carnegie against Cranbourn, *voce* SUPERIOR AND VASSAL; Ogilvy against Kinloch, *voce* PERSONAL AND TRANSMISSIBLE; Carnwath against Creditors of Nicolson, *voce* IMPLIED DISCHARGE AND RENUNCIATION. The barony, of which this feu is part, is all parcelled out in feus, some of which are in these terms; in others, assignees are not mentioned; and when they are, sometimes are omitted in the subsequent rights; so that it appears the words were not looked on as material: And any import they could have, is destroyed by the reference to the use of feu-farm, as it is not the use to receive singular successors, except for a year's rent.

2*dly*, The York-buildings Company are singular successors, being purchasers from the King, who acquired by the Earl's forfeiture; and singular successors in the superiority are not bound by pactions of this nature, which are only personal: It is not every clause that goes into a charter that makes a real right to the vassal; because purchasers of the superiority contract on the faith of the records, and finding thereon the feu infeftment, conclude they have right to the usual feudal casualties: What is implied in the nature of feudal holdings, may be presumed from the infeftment's being on record; but when the superior's right is meant to be impaired, the concessions ought to enter the sasine, as a charter without it is not a real right: In the case of the Lady Sinclair against Sir James Stewart 1732 *, a clause in the original right that singular successors were to be entered *gratis*, was found not effectual against the purchaser of the superiority; and the like, 9th November 1748, Nasmyth against Story, *voce* HOMOLOGATION; where the superior was only found bound to receive the vassal for a taxed sum, because his own disposition was with the express burden of the vassal's rights.

Answered, The words *assignee* and *disponee* are synonimous, and apply to real as well as personal subjects: Personal rights are properly rights of obligation; and what we call a personal right to a land-estate is more properly *jus ad rem*, or an incomplete real right: Craig understands the word *assignee* to comprehend a disponee to a completed right; and, for that reason, a charter to as-

* *See* GENERAL LIST OF NAMES.

signees to be a defence against recognition, l. 3. D. 3. § 31.; and though this defence was repelled in Carnegie's case, it does not follow, that such was not the proper import of the word: The feu in question is very old; and the writer of the charter cannot be said to have used the expression without meaning, when it will bear the signification given it by Craig, who was so learned in the feudal law and language: It cannot be here understood of any assignee to the charter before infeftment, for such owed no relief to the superior, but could be infeft without any further act on the superior's part for which it might be due. No 10.

2dly, It is a mistake that there is nothing real of a feu-right but what is contained in the sasine; for, there are clauses in the charter, which as they are real and binding on the singular successor in the property, so are they in his favour on the successor in the superiority: The *tenendas* determine the holding; the *reddendo* also determines this, and in ward whether it is simple or taxed; and not only the taxation of the ward, but of the subsequent non-entry; of the marriage, and relief on the entry of heirs: The composition could not be taxed for the entry of singular successors, because there could be none such according to the tenure; in feus, the legal irritancy for not payment of two terms feu-duty, may be, and is frequently taxed; these clauses qualify the right, both of the superior and vassal, though they enter not the sasine. There is nothing in law to hinder the composition by singular successors to be taxed in feus, as well as any other casualty; especially as these are not considered as *beneficia*, but onerous purchases. The case betwixt Sinclair and Stewart rested on a personal contract without the obligation's being in the charter: In that betwixt Story and Nasmyth, the charger is informed the question on the Bench was not so much, whether the obligation could be made real, by being properly insert in the *reddendo* of the charter, as whether it was real by the import of the clause; and the clause being once found not real, afterwards the question was avoided; and the decision laid on the superiority's being conveyed with the burden of the feu-right.

Observed, That of old, no superior was obliged to receive a singular successor, till by the act of Parliament 1469, he was bound to receive an appriser, on payment of a year's rent. Before the act, 20th Geo. II. allowing summary charges against superiors, no vassal could oblige the superior to enter him, but by apprising or adjudging, and thereupon behoved to pay a year's rent; by this means, the superior, unless bound by his own contract, was enabled to disregard any taxation of the composition, though in both charter and sasine: But if he once entered him, the taxations of the other casualties were binding on him, as qualifying the right.

That the decision, 10th February 1749, Macvicar against Cochran, No 9. p. 4180., differed so far from this case, that there the clause was in the sasine.

THE LORDS found that the suspender was not obliged to enter a singular successor, except on payment of a year's rent.

Reporter, *Milton*. Act. *R. Craigie*. Alt. *Lockhart*.

Fol. Dic. v. 3. p. 206. D. Falconer, v. 2. No 227. p. 274.

For import of various clauses in charters; *See* Clause.

For the ascertainment of non-entry duties; *See* Non-Entry.

See Cockburn against Creditors of Langton, No 17. p. 150.

See Appendix.